

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE
ORIGINAL

FCC 93M-360

31750

JUN 16 1 15 AM '93

In re Applications of

MM DOCKET NO. 93-54

DISPATCHED BY
GAF BROADCASTING COMPANY, INC.

File No. BRH-910201WL

For Renewal of License
of Station WNCN(FM)
New York, New York,

CLASS ENTERTAINMENT AND
COMMUNICATIONS, L.P.

File No. BPH-910430ME

For Construction Permit for a New
FM Station on 104.3 MHz
at New York, New York

MEMORANDUM OPINION AND ORDER

Issued: June 10, 1993

Released: June 15, 1993

1. Under consideration are "Petition For Intervention" filed April 19, 1993 by Listeners' Guild, Inc. (Guild), Mass Media Bureau's Opposition To Petition For Intervention filed April 28, 1993, Opposition To Petition For Intervention filed May 5, 1993 by GAF Broadcasting Company, Inc. (GAF), Consolidated Reply To Oppositions To Petition For Intervention filed by Guild, "Motion For Leave To File Motion Out Of Time" filed May 18, 1993 by Guild, "Motion For Leave To File Consolidated Reply To Oppositions To Petition For Intervention" filed May 18, 1993 by Guild; ¹ "Motion To Enlarge Issues" filed April 19, 1993 by Guild, Mass Media Bureau's Opposition To Motion To Enlarge Issues filed April 28, 1993, Opposition To Motion To Enlarge Issues filed May 4, 1993 by GAF, and Consolidated Reply To Oppositions To Motion To Enlarge Issues filed May 17, 1993 by Guild.

2. Guild seeks to intervene in this proceeding under either Sections 1.223(a) or 1.223(b) of the Commission's Rules. ² Guild argues that it is entitled to intervene as a matter of right to prosecute its petition to deny the renewal of GAF's license. However, Guild's petition to deny has been denied. See Hearing Designation Order (HDO), 8 FCC Rcd 1742 (ASD 1993). Further none of the matters raised by Guild in its petition to deny are at issue in this

¹ Good cause having been shown, Guild's "Motion For Leave To File Motion Out Of Time" (one day late) and its "Motion For Leave To File Consolidated Reply To Oppositions To Petition For Intervention", which are unopposed, are granted.

² Guild's petition includes affidavits from two of its officers. They recite, inter alia, that Guild is a not-for-profit corporation organized in 1974 to represent the interests of listeners in connection with a change of WNCN's classical music format and that Guild's members consist of listeners residing in areas reached by WNCN's signal.

hearing proceeding. Under Rule 1.223(a) as well as Rule 1.223(b), a petitioner seeking intervention must demonstrate an interest in the proceedings sufficient to justify participation as a party. GAF Broadcasting Co., Inc., 55 RR 2d 1639 (1984). In GAF, the Commission emphasized that to establish such an interest members of the listening public must furnish specific factual allegations supporting the contention that a grant (or denial) of the subject application would not serve the public interest. Further, in the absence of a particularized interest in the outcome of a proceeding relevant to petitioners' status as members of the listening public, "a mere institutional interest in the general subject matter of a proceeding does not warrant granting party status." 55 RR 2d at 1644.³ Guild has not shown how its interest will be adversely affected. As noted, its petition to deny has been denied and none of Guild's allegations have been designated for hearing. Therefore, Guild has failed to establish a basis for intervention under Rule 1.223(a). In this connection, contrary to Guild's assertion, the grant of petitioner status to consider Guild's allegations does not make Guild a party in interest to the comparative hearing. Guild's claim that it has been accorded such status finds no support in the HDO. Also, it makes no sense since, as discussed above, none of the issues it requested have been designated for hearing.⁴

3. In the alternative, Guild contends that it should be permitted to intervene pursuant to Section 1.223(b) of the Commission's Rules. In support, Guild argues that for many years it has closely followed and monitored WNCN(FM)'s programming and GAF's management and corporate activities. Additionally, Guild claims many years of involvement in proceedings involving GAF and WNCN(FM). Guild asserts that its knowledge of GAF, acquired over time, would be helpful in assessing GAF's character and the quality of its performance as a licensee, and that allowing it to intervene would bring to the proceeding the viewpoint of the listening audience.

4. Section 1.223(b) of the Commission's Rules provides that, in addition to establishing the petitioners' interest in the proceeding, a petition to intervene "must show how such petitioner's participation will assist the Commission in the determination of the issues in question" Guild has failed to demonstrate how its participation would assist the Commission in the resolution of the designated issues. Guild's proffer is limited solely to its ability to assist in the evaluation of GAF's character and performance. There is, however, no issue in this proceeding as to GAF's character. Moreover, there is nothing in Guild's petition to demonstrate that it has particular or unique knowledge such that its assistance as a party is needed to resolve the comparative issues. To the extent that Guild possesses relevant, material and competent information concerning WNCN(FM)'s performance under the "renewal expectancy" aspect of the comparative case, it may offer such evidence as a non-

³ It is noted that Guild has filed with the Commission a petition for reconsideration of the denial of its petition to deny. That is the proper forum for the relief sought by Guild.

⁴ Guild also posits entitlement to intervention on grant of its pending petition to enlarge issues against GAF. However, for the reasons discussed below, Guild's petition has been denied.

party witness pursuant to Section 1.225 of the Commission's Rules.⁵ Therefore, Guild's request for discretionary leave to intervene under Rule 1.223(b) is denied.

5. In pursuance of its request for intervention under Rule 1.223(b), Guild has proposed inclusion of issues against GAF. Guild's first requested issue is premised on disclosures made in GAF's February 22, 1993, Amendment to Consolidated Opposition. There, GAF acknowledged and corrected certain errors with respect to its EEO performance that it made in its Consolidated Opposition to Petitions to Deny. Guild now seeks an issue to determine the facts and circumstances concerning the reporting of this data to the Commission. The HDO expressly stated:

All pleadings, allegations, and agreements which relate to WNCN(FM)'s equal employment program and practices have been referred to the Mass Media Bureau's EEO Branch for Commission disposition. Any grant of GAF's renewal application will be conditioned on the Commission's resolution of the EEO allegations.

8 FCC Rcd.

6. The quoted language makes clear that the EEO branch has been given the authority to resolve all allegations against the WNCN renewal stemming from its EEO record and filings. It is self evident that the proposed issue concerns EEO matters which have been specifically delegated to the EEO branch. Guild appears to recognize that fact since it urges that "upon adding this issue, the Presiding Officer should bring all other EEO related issues within the ambit of the hearing, since they are inextricably interwoven." Motion To Enlarge Issues, p. 3. Nevertheless, Guild argues that the Presiding Judge has the authority to add the issue because GAF's EEO amendment was filed too soon before adoption of the HDO to have been specifically considered. Guild's contention as to receipt of the amendment is based solely on speculation and conjecture. More to the point, the date of its receipt is irrelevant since the HDO did not consider any EEO allegations. The HDO intended for the EEO branch to resolve such allegations. In light of this clear and unambiguous directive, the Presiding Judge is without authority to grant the relief sought by Guild. Frank H. Yemm, 39 RR 2d 1657 (1977); Anax Broadcasting Incorporated, 87 FCC 2d 483, 486 (1981). Its request for an EEO issue is, therefore, denied.

7. Guild's second proposed issue is predicated on its contention that the HDO failed to address the argument raised in its Petition to Deny that GAF abused the Commission's processes by threats and inducements in an effort to dissuade Guild from presenting facts and arguments adverse to GAF. Guild's contention that the HDO failed to address its allegations is without merit. Paragraph 33 makes clear that the HDO considered and rejected Guild's arguments. Since the HDO contains a "reasoned analysis" of the matter raised and Guild has submitted no new facts on the subject, the Presiding Judge is without authority

⁵ Guild's petition does not delineate the specific evidence which it wishes to offer pertaining to GAF's past record.


to reconsider a determination made in the HDO. Atlantic Broadcasting Co., 5 FCC 2d 717 (1966). To the extent that Guild is dissatisfied with the HDO's conclusions, that argument is properly made in a petition for reconsideration, which it has filed.⁶

Accordingly, IT IS ORDERED, That the "Motion For Leave To File Motion Out Of Time" and the "Motion For Leave To File Consolidated Reply To Oppositions To Petition For Intervention" filed May 18, 1993 by Listeners' Guild, Inc. ARE GRANTED.

IT IS FURTHER ORDERED, That the "Petition For Intervention" filed April 19, 1993 by Listeners' Guild, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Motion To Enlarge Issues" filed April 19, 1993 by Listeners' Guild, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


Joseph Chachkin
Administrative Law Judge

⁶ Rule 1.229(d) provides that motions to enlarge issues shall contain specific allegations of fact sufficient to support the action requested. Further, such allegations of fact are to be supported by affidavits of persons having personal knowledge thereof. Guild's allegations are entirely unsupported. Assuming, arguendo, Guild's motion was considered on its merits, the lack of factual support for the issues proposed would compel their denial.